

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**Appeal from the Michigan Court of Appeals,
Peter D. O'Connell (Presiding Judge), Patrick M. Meter, and Michael F. Gadola**

CLAM LAKE TOWNSHIP, a Michigan
municipal corporation; and HARING
CHARTER TOWNSHIP, a Michigan
municipal corporation,

Appellants.

Supreme Court Docket No. 151800

Court of Appeals Docket No. 325350

Wexford County Circuit Court Case No. 14-
25391-AA

State Boundary Commission Docket No. 13-
AP-2

v

STATE BOUNDARY COMMISSION, an
administrative agency with the Michigan
Department of Licensing and Regulatory
Affairs; TERIDEE LLC, a Michigan limited
liability company; and CITY OF CADILLAC,
a Michigan home rule city,

Appellees.

**APPELLEE TERIDEE LLC'S
BRIEF ON APPEAL**

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COUNTER-STATEMENT OF BASIS OF JURISDICTION

Appellees agree with Appellants' jurisdictional statement.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Should this Court overturn the Michigan Court of Appeals' decision in *Casco Township v State Boundary Commission*, 243 Mich App 392; 622 NW2d 332 (2000), which held that the State Boundary Commission has the jurisdiction and authority to decide the validity of an Act 425 agreement, when (1) there is a presumption in favor of upholding precedent and Appellants have failed to demonstrate "compelling justification" for overturning *Casco Township*; (2) the Court of Appeal's decision in *Casco Township* was based on and supported by this Court's decision in *Shelby Charter Twp v State Boundary Comm'n*, 425 Mich 50; 387 NW2d 792 (1986); (3) Appellants did not preserve this issue for appeal by raising it below; and (4) Appellants unequivocally and successfully argued in a separate lawsuit that the State Boundary Commission does have the jurisdiction to determine the validity of an Act 425 agreement, that the State Boundary Commission is better suited than the circuit court to decide that issue, and that the holding in *Casco Township* is sound?

The State Boundary Commission was not asked to address this issue.
The Circuit Court was not asked to address this issue.

The Court of Appeals denied Appellants' application for leave to appeal
"for lack of merit in the grounds presented."

Appellees answer:	No.
Appellants answer:	Yes.

2. Was there competent, material, and substantial evidence to support the State Boundary Commission's determination that Appellants' Act 425 Agreement is invalid because it was entered into in order to avoid annexation?

The State Boundary Commission answered:	Yes.
The Circuit Court answered:	Yes.

The Court of Appeals denied Appellants' application for leave to appeal
"for lack of merit in the grounds presented."

Appellees answer:	Yes.
Appellants answer:	No.

3. Did the Circuit Court correctly hold that the doctrine of collateral estoppel does not apply to the State Boundary Commission's decision, when (1) Appellants waived the argument by failing to raise it before the State Boundary Commission; (2) the legislature did not intend for State Boundary Commission decisions denying annexation petitions to be final; (3) the State Boundary Commission's decision-making process with respect to annexation is legislative and not adjudicatory in nature; and (4) there was a change in circumstances between the first and second State Boundary Commission adjudications, such that the ultimate issue considered was not identical?

The State Boundary Commission was not asked to address this issue.

The Circuit Court answered:	Yes.
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The Court of Appeals denied Appellants' application for leave to appeal "for lack of merit in the grounds presented."

Appellees answer:	Yes.
Appellants answer:	No.

The [State Boundary Commission] has the statutory power to adjudicate [Appellee Teridee LLC's] annexation petition. . . . Determination of the validity of an Act 425 Agreement is a necessary step in the SBC's annexation proceedings, as the SBC has already decided in this case. The SBC frequently hears testimony and other evidence regarding Act 425 agreements, and has already done so in this case. The SBC is not only capable of determining the validity of Act 425 agreements, but is uniquely suited to do so, since such determinations must be made in every annexation case involving an Act 425 agreement.

Appellants' September 10, 2013, Brief in Support of Motion for Summary Disposition at 13, *TeriDee LLC, et al v Clam Lake Twp, et al*, Wexford County Circuit Court Case No. 13-24803-CH (citations omitted)(emphasis added). Appellee's Appendix, 15b.

INTRODUCTION

It was plainly evident to two separate tribunals, the State Boundary Commission ("SBC") and the Circuit Court, that Appellants Clam Lake and Haring Charter Townships' (the "Townships") Act 425 Agreement was a sham contract, an illusory agreement that the Townships entered into solely in an attempt to thwart annexation. Likewise, the Court of Appeals found no validity in the Townships' protestations of the decisions below, as it denied the Townships' application for leave to appeal "for lack of merit in the grounds presented." Two other Tribunals also ruled that the Townships' Act 425 agreement is invalid and void as against public policy on completely separate grounds.¹ Thus, four different tribunals, seven different judges, and four members of the SBC all agree: the Townships' Act 425 Agreement is invalid and did not therefore prevent the SBC from considering TeriDee's annexation petition.

For their part, it is incredible that the Townships can still claim with a straight face that they entered into the Act 425 Agreement for any purpose other than to block TeriDee's

¹ In a separate lawsuit from the proceedings below, the circuit court granted Appellee TeriDee LLC's ("TeriDee") motion for summary disposition on its request for a declaratory judgment, holding that the Townships' Act 425 Agreement was void because it unlawfully restricted and delegated Haring Township's legislative authority. The Court of Appeals affirmed the circuit court's ruling in its December 8, 2015, opinion. This Court granted the Township's application for leave, and that appeal, Docket No. 153008, is currently pending.

annexation petition. The timing of the agreement, the fact that it was drafted by an attorney who represented both of the parties, the contemporaneous e-mail communications, the prohibitive development restrictions, the Townships' failure to communicate with the only potential developer, the illusory utilities provisions, the prohibitive utility costs, the lack of any benefit to Clam Lake under the agreement, and the Townships' prior sham agreement leave absolutely no doubt about the Townships' true motives. It is offensive for the Townships to continue to advance their false narrative in the face of this overwhelming evidence, and it certainly destroys their credibility. The SBC properly invalidated the Townships' sham Act 425 Agreement and approved TeriDee's annexation petition.

Because the Townships cannot credibly argue that they entered into their Act 425 Agreement for any legitimate purpose, their primary argument on appeal to this Court is that the SBC exceeded its jurisdiction and authority when it determined that the Townships' Act 425 Agreement was invalid. This argument is contrary to the single binding precedent that is directly on point: the Court of Appeals' decision in *Casco Township*. Thus, in order for the Townships to prevail, this Court would need to overturn *Casco Township*, which is what Appellants now seek for the first time on appeal to this Court.

Appellants' new argument should be rejected on multiple grounds, including for the reason that there is no compelling justification for overturning the decision in *Casco Township*. Indeed, in 2001 this Court previously refused to consider an application for leave to appeal from the *Casco Township* decision, and there has been no intervening change in the law that would warrant a different decision now. Moreover, the reasoning and analysis in *Casco Township*, which relies on multiple decisions of this Court, remain sound, a position that the Townships themselves vigorously argued in the proceedings below in the companion case on appeal.

As the Townships successfully argued before the circuit court in the companion case, the SBC is "uniquely suited" to determine the validity of an Act 425 agreement and "must" necessarily do so in every annexation case involving an Act 425 agreement. The Townships were correct in making these arguments, which demonstrate why *Casco Township* was properly decided. And because the Townships successfully and unequivocally argued that the SBC has jurisdiction to determine the validity of an Act 425 agreement, they are precluded from making the opposite argument in this case pursuant to the doctrine of judicial estoppel. The Townships are also precluded from asking this Court to overturn *Casco Township* because they never made such a request or argument in the proceedings below.

Finally, the Townships offer only a single argument on appeal in opposition to the SBC's approval of TeriDee's annexation petition, claiming that the SBC should have applied the doctrine of collateral estoppel. This is a curious argument for the Townships to make, as they never invoked the doctrine or requested that it be applied in the proceedings before the SBC. More importantly, it is clear that the doctrine of collateral estoppel has no application in this case. Under the established test, the doctrine of collateral estoppel does not apply to an administrative proceeding where there is a statutory right of reapplication, as is the case here. Likewise, the doctrine does not apply to legislative functions, which is one of the reasons why the Townships cannot present this Court with any case law where collateral estoppel has been applied to decisions of the SBC. Indeed, this Court has explicitly recognized that annexation is a legislative question.

For all of these reasons, the SBC's Summary of Proceedings, Findings of Fact, and Conclusions of Law, as approved by the Final Decision and Order of the director of LARA, should be affirmed on appeal.

COUNTER-STATEMENT OF FACTUAL AND PROCEDURAL BACKGROUND

A. Overview of the Annexed Property and the Proposed Development

For more than six years, TeriDee has been trying to develop its property at the interchange of M-55 and US-131. As TeriDee has described in various media and in its annexation petition, it seeks to develop a first-class, professionally landscaped development that would have a single boulevard entrance, 90 percent of the development set back over 175 yards from M-55, and include 15 to 20 acres of undeveloped property acting as a buffer from the abutting property to the east. Appellants' Appendix, 1440a-1446a. The Townships vigorously oppose any such development and have attempted to block it at every turn, including by entering into two separate sham Act 425 agreements, the most recent of which was the subject of the appeal below (the "Act 425 Agreement").

The annexed area is approximately 241 acres in size. *Id* at 1440a. TeriDee owns approximately 141 acres of vacant land (the "Property"), which equates to over 95 percent of the private property in the annexed area, as the vast majority of the remaining acreage is public property.² *Id*. The Property is located near the intersection of M-55 and US-131. Appellants' Appendix, 1461a. TeriDee intends to develop the Property into a mixed-use development that would include retail stores, a hotel, a restaurant, and other commercial entities. Appellants' Appendix, 1461a. It has been estimated that this project would create between 850 and 1,000 jobs. *Id.*; Appellee's Appendix, 30b. The proposed investment for the developed Property has been estimated to be at least \$40,000,000. Appellants' Appendix, 1462a.

² Less than 6.5 acres of private property, contained in seven separate parcels, is owned by others. Of these seven owners, two have indicated to TeriDee that they have no objections to the annexation. Appellants' Appendix, 1440a.

TeriDee sought annexation of the Property into the City of Cadillac in order to gain access to the City's water and sewer services, as the proposed development cannot occur without connection to these public services. Appellee's Appendix, 24b. The City of Cadillac has water and sanitary sewer services within one-quarter mile from the proposed annexation area, and the City of Cadillac is able to provide the necessary public services as soon as they are required. In contrast, Clam Lake Township does not have the infrastructure nor the facilities to provide TeriDee with the necessary utilities for its planned development.

B. The State Boundary Commission Invalidated the Townships' Prior Act 425 Agreement, Characterizing It as "Bovine Scatology."

On June 3, 2011, TeriDee filed its first application with the SBC that would have allowed the Property, along with other property, to be annexed into the City of Cadillac. *Id* at 162b. After TeriDee filed its 2011 annexation petition, the Townships hurriedly compiled an Act 425 agreement that contemplated some non-specific, future development for the same land. *Id*. As if the timing and content of the agreement was not evidence enough, communication between the Townships and the leaders of the neighborhood opposition makes clear that the 2011 agreement was engineered solely to "avoid the possibility of the Boundary Commission making the decision on the development project." *Id* at 31b (emphasis added).

The Townships' attempted misuse of Act 425 did not fool the SBC. Their sham agreement was rejected by the SBC without dissent and with a member of the SBC characterizing the agreement as "bovine scatology." The SBC specifically concluded that the Townships' first Act 425 agreement was "invalid" because "it was not being used to promote economic development." *Id* at 163b. This determination was based on the following facts regarding the Townships' first Act 425 agreement:

- a. No clearly defined economic development project is named.

- b. Clam Lake Township received no benefit from the agreement, i.e., there is no revenue sharing included.
- c. Copies of e-mails obtained by the petitioner through a Freedom of Information Act Request and provided to the Commission between Clam Lake Township and the Charter Township of Haring discussed the 425 agreement as a means to deny the Commission jurisdiction over the proposed annexation.
- d. Concern over the Charter Township of Haring's ability to effectively and economically provide the defined public services. No cost study was proven to analyze the differential connecting the area to public services from the Charter Township of Haring versus connecting to services from the city of Cadillac.
- e. The timing of the 425 agreement. The agreement was executed more than three months after the annexation request was filed.

Id.

Notwithstanding that the Townships' Act 425 agreement was rejected, TeriDee's 2011 annexation petition was ultimately denied, without explanation, pursuant to an October 3, 2012, final decision and order by the Department of Licensing and Regulatory Affairs ("LARA"). *Id.* With TeriDee's proposed development at least temporarily on hold, the Townships did not even bother to keep up the charade that they were interested in any development of TeriDee's property. Indeed, the Townships did not bother to prepare a new Act 425 agreement until the eve of the filing of TeriDee's renewed annexation petition.

C. The Townships Entered Into a Second Act 425 Agreement in an Attempt to Thwart TeriDee's Renewed Annexation Petition.

The SBC rules allow for the filing of a new annexation petition no earlier than two years after the previous petition was filed. MCL 123.1012(3). Pursuant to this rule, TeriDee filed its new annexation petition on June 5, 2013. When the Townships, which continued to oppose TeriDee's proposed development, became aware of TeriDee's intention to file a new petition, they immediately resorted to a familiar scheme: entering into a sham Act 425 agreement.

The Townships continue to devote significant time and effort in their brief on appeal in describing the supposed genesis of the Act 425 Agreement. This is no doubt motivated by their realization that they face an uphill battle convincing anyone that their new Act 425 Agreement, which they executed less than ten months after their first Act 425 agreement was rejected by the SBC, is the result of pure motives and a genuine change of heart regarding the development of the Property.

According to the Townships in their filings with the SBC, the Act 425 Agreement "represents the fruition of a long-established, thoroughly-evaluated plan." Appellants' Appendix, 1470a. Indeed, the Townships would have this Court believe that the Act 425 Agreement was the result of deliberation and discussions that date back to 1999 regarding the Townships' plans for sharing utility services. *Id.* The Townships further maintain that they each independently decided that May 8, 2013, was an "ideal time" to hold a special meeting to enter into the Act 425 Agreement, which, as they claim, is "the culmination of long-established plans" to extend Haring utility services to Clam Lake. *Id.* At 1469a.

Both the SBC and the circuit court rightfully rejected this false narrative, based in part on the e-mail communication between Township representatives and the leaders of the neighborhood opposition groups. Those e-mails likely gave the SBC a sense of déjà vu. They involve the same key individuals, they were sent to the same distribution lists, they express the same alarm at the proposed annexation and development of the Property, and they propose the same solution to this perceived problem: an Act 425 agreement. Appellee's Appendix, 186b-188b. Most significantly, they remove any doubt that the Act 425 Agreement was entered into for any reason other than to block the annexation.

At the public hearing in the proceedings below, the City of Cadillac's mayor *pro tem*, Art Stevens, reported that on April 11, 2013, a city official informed Clam Lake officials that TeriDee would be filing a new annexation petition. In response to this news, there was an immediate e-mail exchange (among the same individuals who previously supported the effort to prevent TeriDee's annexation petition by filing a sham Act 425 agreement) that specifically mentions using an Act 425 agreement as a strategy to prevent annexation. The e-mail further suggests that, this time around, the Townships should enact the agreement "BEFORE" the annexation petition is filed in order to convince the SBC that the Townships are not engaged in a "ploy." *Id.* Less than a month later, the agreement was both introduced and approved at a joint special meeting of the Township boards.

Four days later, in an April 15, 2013, e-mail exchange between, among others, George Giftos (vice chairman of the Haring Planning Commission) and Dale Rosser (the Clam Lake supervisor), the Townships' true motivation in entering into the Act 425 Agreement was revealed. That e-mail exchange, entitled "here we go again," makes clear that the Townships had learned within "the last few days" that TeriDee was preparing to file an annexation petition:

The rumor is that Teri-Dee will re-file for annexation to the City on June 4. How can that happen, you ask? I thought we had 2 years before they could file again. Well, we did, but it's 2 years from the original date of their filing and that was June 4, 2 years ago! If they fast-track the project and the State Boundary Commission approves, Teri-Dee could conceivably be all set to go by the end of summer.

Now, what are our options? As I see it, the reason that the 425 agreement with Haring TWP was thrown out by the State Boundary Commission was that it was deemed to be a ploy and had been filed AFTER the filing by Teri-Dee for annexation. If we were to pursue this again and got it done BEFORE June 4, that argument would no longer apply.

Id. (emphasis added).

Other e-mails produced by the Townships make clear that the Townships and their supporters did not suddenly change their minds about the development of the Property. They continue to vigorously oppose any commercial development of the Property, and the e-mails express optimism that the stringent zoning requirements in the Act 425 Agreement will stifle any proposed development and send it somewhere else. On May 4, 2013, four days before the Townships entered into the Act 425 Agreement, George Giftos wrote to the Townships' supervisors, Dale Rosser and Bob Scarbrough, to express his optimism that the restrictive PUD requirements in the Agreement would drive away any potential development:

[I]f I were bringing a retail business to Cadillac, and I were to investigate this PUD with its restrictions, I would choose to locate at Boon Road where the other commercial development is going on, so I feel that while we would allow commercial development at M-55, it wouldn't happen.

Id. The Townships' failure to disclose or provide these e-mails to the SBC is particularly disturbing given the Townships' repeated claims in the proceedings before the SBC that, this time around, there were no e-mails showing improper motive. Given the timing of the e-mails, it is now clear that these claims by the Townships were false when made. Likewise, the Townships twice filed motions to supplement the record before the SBC, but failed to produce the e-mails. Appellants' Appendix, 1636a-1806a. It is obvious why the Townships did not want the e-mails to reach the SBC.

In sum, the e-mails do not in any way support the Townships' repeated statements to the SBC that the reason they entered into the Act 425 Agreement was for the purpose of sharing utilities. There is not a single e-mail (or any other communication) involving Township representatives that discusses or proposes entering into an Act 425 agreement for the purpose of sharing utilities. Instead, just as with the e-mails that were produced in connection with the 2011 annexation petition, the only time an Act 425 agreement is ever mentioned is solely in

connection with preventing annexation and development. And that is the sole reason why the Townships entered into the agreement.

D. The Townships' Latest Act 425 Agreement Does Not Require Haring to Provide Utilities.

As part of their effort to lend credibility to their Act 425 Agreement, the Townships claim that they entered into the agreement to facilitate the sharing of utilities. The Act 425 Agreement does not resemble anything close to a utility sharing agreement. First and foremost, it is undisputed that there is no requirement in the Act 425 Agreement that Haring provide any utilities to any property in Clam Lake. Instead, the most the agreement requires is that the Townships "mutually cooperate" in "exploring the extension of Haring public wastewater services to other areas of Clam Lake, subject to the availability of those services Appellants' Appendix, 729a-730a. This requirement to "mutually cooperate" and "explore" the potential extension of utilities imposes no obligation on Haring and provides no benefit to Clam Lake. Haring is not even required to "mutually cooperate" with Clam Lake unless and until water and sewer utilities are first extended to the Transferred Area. See *id.*

However, there is no requirement to extend water or sewer utilities to the Transferred Area. The Townships do not dispute the fact that there are no properties in the Transferred Area that currently need water or sewer utilities from Haring and that none of the property owners in the Transferred Area have requested that Haring provide those services. Thus, there will be no extension of Haring water or sewer services to the Transferred Area unless and until the Property is first developed. This is confirmed by the language of the Act 425 Agreement, which provides that Haring is only required to extend water and sewer to the "newly-developed portion of the Transferred Area" and only under the condition that Clam Lake pay for all of the costs to extend the utilities. See *id.* at 4–5. At the same time, the Agreement contains obstacles to any such

development: ten pages of requirements and regulations that a property owner must satisfy before the property can be developed. *Id.*

In addition, while the proceedings below were pending, the Townships passed identical resolutions of intent that specifically provide that water and sewer utilities will not be provided to the Transferred Area unless the Townships enter into an agreement with TeriDee to develop the Property under which TeriDee agrees to cover all of the costs. Appellants' Appendix, 1205a-1212a. But, TeriDee is not, and has never expressed an interest in, developing the Property under the conditions and restrictions set forth in the Act 425 Agreement. *Id.* at 253a-255a. Common sense alone dictates that if the Act 425 Agreement truly was the culmination of over 15 years of "thorough" planning, it would not condition the provision of utilities on a development project that the Townships vehemently oppose and which was not even contemplated until a few years ago. The Act 425 Agreement is not a utilities sharing agreement, and it is disingenuous for the Townships to suggest otherwise.

E. The Circuit Court Ruled that the Townships' Act 425 Agreement Is Void as Unconstitutional and Against Public Policy in a Separate Proceeding.

Prior to the Circuit Court's opinion in this case affirming the SBC's decisions, it entered a separate opinion and order in a separate proceeding that also invalidated the Townships' Act 425 Agreement, but on separate grounds. TeriDee filed an original action in the Circuit Court against the Townships on August 13, 2013. On September 19, 2014, the Circuit Court entered summary disposition in favor of TeriDee on Count II of TeriDee's complaint, which requested a declaration from the court that the Townships' Act 425 Agreement is invalid, unconstitutional, and violative of public policy because the agreement contracted away Haring's legislative zoning powers. The Circuit Court agreed with TeriDee and held that the Act 425 Agreement is void because of its illegal zoning provisions. Appellee's Appendix, 207b-223b.

F. The SBC Again Invalidated the Townships' Sham Act 425 Agreement and Also Approved TeriDee's Annexation Petition, a Decision that Was Affirmed by the Circuit Court on Appeal.

As set forth above, TeriDee filed its annexation petition on June 5, 2013. Appellants' Appendix, 761a. Over the Townships' filed objection, the SBC determined that the petition was legally sufficient on July 13, 2013. *Id* at 939a-942a; 150a-180a. The SBC held a public hearing on October 23, 2013, and then held an adjudicative session on April 16, 2014. At the adjudicative session, the SBC invalidated the Townships' Act 425 Agreement and approved TeriDee's annexation petition, reaching both decisions by a 4-1 vote. These decisions are set forth in the SBC's proposed Summary of Proceedings, Findings of Fact, and Conclusions of Law, which it issued on June 11, 2014. Appellants' Appendix, 11a-125a. The director of LARA issued a Final Decision and Order on June 26, 2014, approving the SBC's proposed findings. *Id* at 127a-128a.

The Circuit Court affirmed the SBC's decisions on December 9, 2014. The Townships filed an application for leave to appeal with the Court of Appeals, which was denied "for lack of merit in the grounds presented" on May 26, 2015. Appellee's Appendix, 205b. This Court then granted Appellants' Application for Leave to Appeal on April 6, 2016.

LAW AND ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the decisions of the SBC in accordance with the Administrative Procedures Act, MCL 24.201, *et seq.*, and MCR 7.103(A)(3). Specifically, the Court must review the SBC's findings to determine whether competent, material, and substantial evidence existed to support the SBC's decision. *Midland Twp v State Boundary Comm'n*, 401 Mich 641; 259 NW2d 326 (1977); *Casco Twp*, 243 Mich App at 397; MCL 243.06. The determination of

subject matter jurisdiction is a question of law that is reviewed *de novo* on appeal. *Estes v Titus*, 481 Mich 573, 578–79; 751 NW2d 493 (2008).

In *Midland Township* the Michigan Supreme Court provided a lengthy analysis of the proper standard of judicial review of annexation orders. *Midland Twp*, 401 Mich at 672–74. The Court first noted that the Administrative Procedures Act provides for judicial review of SBC proceedings based upon "a determination of whether the administrative action is supported by competent, material and substantial evidence on the whole record." *Id.* at 677 (citing MCL 24.306(d)). The Court then explained how it has previously interpreted the meaning of the "key phrase" in this standard of review, "substantial evidence":

The key phrase "substantial evidence" has been construed by this court to require "a thorough judicial review of administrative decision, a review which considers the whole record that is, both sides of the record not just those portions of the record supporting the findings of the administrative agency. Although such a review does not attain the status of a *de novo* review, it necessarily entails a degree of qualitative and quantitative evaluation of evidence considered by an agency. Such review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact finding by displacing an agency's choice between two reasonably differing views. Cognizant of these concerns, the courts must walk the tightrope of duty which requires judges to provide the prescribed meaningful review."

Id. at 672–73 (internal citations omitted)(emphasis added). Further, the Michigan Supreme Court noted that "resolution of a controverted annexation unavoidably involves political considerations and the exercise of a large measure of discretion." *Id.* at 673. For this reason, the Court cautioned that reviewing courts must not engage in a review of such political determinations:

Evaluation of the record and the Commission's balancing of the criteria and determination of reasonableness implicates the merits of the proposed annexation and poses considerable risk of drawing the judiciary into the resolution of what continues to be despite the adoption of the administrative format essentially a political question. No vested right or legally protected interest being involved, the

judiciary ought to be especially circumspect in reviewing Commission rulings and determinations.

Id. at 673–74 (emphasis added).

Importantly, this same standard of review applies to the SBC's decision to invalidate the Townships' Act 425 Agreement. While the Townships claim that this Court should review that finding under the *de novo* standard, they are wrong. In arguing for this far less deferential standard, the Townships state that the issue of whether a contract complies with a statutory criterion is a question of law, subject to *de novo* review on appeal. While that is a true statement of the law generally, it is not an accurate statement of the issue on appeal below with respect to the Act 425 Agreement.

In the proceedings below the SBC made the factual finding that the Townships entered into the Act 425 Agreement solely as a means to bar annexation. As a result of this factual finding, the SBC concluded that the Act 425 Agreement was invalid as it was not enacted to promote economic development. In order to overcome the SBC's conclusion that the Act 425 Agreement is invalid, the Townships must successfully overcome the factual findings that support that determination. They can only do that if they can demonstrate that those findings were not supported by competent, material, and substantial evidence. Indeed, the Court of Appeals could not have been more clear on this point in *Casco Township*, the single appellate decision on this precise issue:

The second issue for our consideration is whether the commission erred in concluding that the underlying agreement was illusory and therefore not valid. We review the commission's findings for whether competent, material, and substantial evidence existed to support the commission's findings.

Casco Twp, 243 Mich App at 400 (citing *Midland Twp*, 401 Mich at 672); MCL 24.306(1)(d); MSA 3.560(206)(1)(d). The Townships simply ignore this language in *Casco Township* and

blindly march forward with case law discussing the standard of review regarding an agency's interpretation of a statute.

The SBC's findings more than satisfy the proper, and circumspect, standard of review on both issues before the Court. This is why the Townships brazenly suggest that the Court go beyond the prescribed standard of review, encouraging this Court to apply a *de novo* review to the SBC's factual determination regarding the Act 425 Agreement. This is an inquiry that the Court should not undertake, and it is improper for the Townships to suggest otherwise.

II. THE SBC HAS JURISDICTION TO DECIDE THE VALIDITY OF AN ACT 425 AGREEMENT.

There is no dispute that the SBC has jurisdiction to determine the validity of an Act 425 Agreement under Michigan law. In their first argument, a new argument raised for the first time on appeal before this Court, the Townships ask the Court to change Michigan law by overturning the Court of Appeal's holding in *Casco Township* that the SBC has jurisdiction to determine the validity of an Act 425 Agreement. The Townships' argument is fatally flawed on numerous grounds and is not supported by the principles of *stare decisis*. There is no basis at all for the Court to overturn *Casco Township*, let alone a "compelling justification," the standard required under the doctrine of *stare decisis*.

As the United States Supreme Court has explained, the doctrine of *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v Tennessee*, 501 US 808, 827; 111 S Ct 2597 (1991). For this reason, "a stare decisis analysis should always begin with the presumption that upholding the precedent involved is the preferred course of action." *Petersen v Magna Corp*, 484 Mich 300, 317; 773 NW2d 564 (2009). Thus, the presumption in favor of upholding precedent "should be retained until effectively rebutted by the conclusion that a compelling justification exists to overturn the

precedent." *Id.* at 317. In determining whether compelling justification exists, "a number of evaluative criteria may be relevant, but overturning precedent requires more than a mere belief that a case was wrongly decided." *McCormick v Carrier*, 487 Mich 180, 211; 795 NW2d 517 (2010) (internal citations omitted).³

Here, the Townships have not addressed any of the evaluative criteria identified by this Court or the overarching "compelling justification" standard, and their silence speaks volumes. Simply put, there is no compelling justification for overturning *Casco Township*. Indeed, this Court previously declined to consider the appellants' application for leave to appeal from the *Casco Township* decision itself, and for good reason. The Court of Appeals' reasoning, analysis, and decision in *Casco Township* are sound and are based on multiple decisions of this Court, decisions that the Townships failed to even address on appeal. This includes the Court's decision in *Shelby Charter Township v State Boundary Commission*, 425 Mich 50; 387 NW2d 792 (1986), a decision that both supports and closely parallels the *Casco Township* decision.

In *Shelby Charter Township*, this Court was presented with the question of whether the SBC had the jurisdiction and authority to consider the facts and circumstances surrounding the purported satisfaction of a statutory provision outside of the State Boundary Commission Act that, if satisfied, would deprive the SBC of jurisdiction to consider an annexation petition. This Court answered that question in the affirmative in *Shelby Charter Township*.

³ As this Court held in *Petersen*, these criteria include, but are not limited to: "(1) whether the rule has proven to be intolerable because it defies practical workability, (2) whether reliance on the rule is such that overruling it would cause a special hardship and inequity, (3) whether related principles of law have so far developed since the rule was pronounced that no more than a remnant of the rule has survived, (4) whether facts and circumstances have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, (5) whether other jurisdictions have decided similar issues in a different manner, (6) whether upholding the rule is likely to result in serious detriment prejudicial to public interests, and (7) whether the prior decision was an abrupt and largely unexplained departure from precedent." *Petersen*, 484 Mich at 319-20.

The appellant township in *Shelby Charter Township* challenged the SBC's decision allowing annexation by a contiguous city. The township argued that the SBC lacked jurisdiction to consider the annexation petition based on language in MCL 42.34, which provides that a township is exempt from annexation if it meets certain statutory criteria, including that the township "provides water or sewer services, or both, by contract or otherwise." MCL 42.34(1)(f). Evidence was presented to the SBC that indicated that the township only provided sewer services in 6 percent of its territory and provided water services to less than one-third of its population. *Shelby Charter Township*, 425 Mich at 54–55. The SBC found that the level of services provided by the Townships failed to meet the statutory requirement, which in turn led the SBC to conclude that it was not deprived of jurisdiction to consider the annexation petition.

Just as the Townships argue in this case, the appellant in *Shelby Charter Township* attempted to use the language from a separate statute to support an argument that the SBC lacked jurisdiction. According to that argument, as long as a township provided any water and sewer services, the language in MCL 42.34 prevented the SBC from considering an annexation petition. Put another way, the appellant argued that the SBC did not have the jurisdiction or authority to consider the underlying facts to determine whether the township was providing sufficient water or sewer services. This Court rejected that argument in *Shelby Charter Township*, just as it should reject the Townships' attempt to revive that argument here.

Specifically, the Court held that the SBC correctly interpreted MCL 42.34 as requiring more than the provision of *de minimis* services and that the mere provision of *de minimis* water services did not act to deprive the SBC of jurisdiction to consider an annexation petition. *Id.* at 75–76. A such, the SBC was correct in looking to the facts and substance of the services provided—and had the authority to do so. *Id.* at 77.

Given the Townships' arguments, it is significant to note that this Court reached its holding in *Shelby Charter Township* notwithstanding the fact that, just as with Act 425 Agreements, there is no express statutory language discussing the SBC's jurisdiction or authority to consider the level or quality or quantity of water or sewer services provided. This is of course consistent with this Court's holding that the SBC and other administrative agencies have those implied powers that are "necessary to the due and efficient exercise of the powers expressly granted." *Ranke v Corp & Secs Comm'n*, 317 Mich 304, 309; 26 NW2d 898 (1947)(internal quotation omitted).⁴ The decision in *Shelby Charter Township* is also consistent with this Court's holding that an administrative agency has the authority to make factual determinations as to whether it has jurisdiction to consider annexation petitions. See, e.g., *Judges of the 74th Judicial Dist v Bay Cnty*, 385 Mich 710, 728–29; 190 NW2d 219 (1971); *Pet Labor Mediation Bd*, 365 Mich 645, 655; 114 NW2d 183 (1962). That is exactly what the SBC does when it considers issues like whether a township is providing more than *de minimis* water services or whether two townships have entered into a legitimate Act 425 agreement or a sham document designed to act as "shark repellent."

In sum, the Court's holding in *Casco Township* is consistent with and supported by the body of case law developed by this Court as well as the "broad powers concerning annexations" that have been conferred upon the SBC by the legislature. *Owosso Twp v Owosso*, 385 Mich 587, 590; 189 NW2d 421 (1971). There has been no change in the law since 2001, when this

⁴ Likewise, in *Coffman v State Board of Examiners in Optometry*, 331 Mich 582, 590; 50 NW2d 322 (1951), the Court stated that an administrative agency's "powers are limited by the statutes creating them to those conferred expressly or by necessary or fair implication" (emphasis added)(internal citation and quotations omitted). In *Ghidotti v Barber* and *Clonlara v State Board of Education*, the Court quoted Bienenfeld, Michigan Administrative Law (2d ed.), ch. 4, pp. 18–19, with approval: "Rulemaking authority may . . . be inferred from other statutory authority granted to an agency." *Ghidotti v Barber*, 459 Mich 189, 202; 586 NW2d 883 (1998); *Clonlara v State Bd Educ*, 442 Mich 230, 237; 501 NW2d 88 (1993).

Court previously declined to consider an application challenging that decision. There is no reason for the Court to change course today.

In addition, not only do this Court's holdings in *Shelby Charter Township and Casco Township* continue to remain good law, they continue to make good sense. As the Townships themselves have previously argued, the SBC is "uniquely suited" to determine the validity of Act 425 agreements and "must" necessarily make such determinations in every annexation case involving an Act 425 agreement. Appellee's Appendix, 15b. The Townships' prior arguments echo those of the Court of Appeals in *Casco Township*, which correctly notes that the SBC could not "perform its function of resolving the [annexation] petition" without first considering the validity of the Act 425 Agreement. *Casco Twp*, 243 Mich App at 399. To contend otherwise, as the Townships (now) do, is to argue that the legislature intended to allow two townships to collude with one another and enter into sham Act 425 agreements that could deprive the SBC of jurisdiction and repel an annexation indefinitely.

Put another way, Appellants would have this Court overturn the decision in *Casco Township* and replace it with the rule that the SBC must blindly accept *anything* labeled as an "Act 425 Agreement" as a complete bar to its authority to consider a petition for annexation, with no ability to determine whether the purported agreement meets the statutory criteria of Act 425. Such a nonsensical standard would effectively end annexation in this State. This is most certainly not what the legislature intended, as has been obvious to every court and tribunal that has considered this issue.

III. THE TOWNSHIPS ARE PRECLUDED FROM ARGUING THAT *CASCO TOWNSHIP* SHOULD BE OVERTURNED ON APPEAL.

Even if Townships' arguments regarding *Casco Township* otherwise had any merit, the Townships would be precluded from raising those arguments in this case as a matter of law.

With respect to the SBC's jurisdiction and authority, the Townships argue in this appeal that:

1. *Casco Township* should be overturned such that the SBC would not have jurisdiction to determine the validity of an Act 425 agreement;
2. The SBC should have "nothing to do with Act 425 agreements";
3. A party that has a concern over the validity of an Act 425 agreement should file a declaratory action in circuit court; and
4. The *Casco Township* decision represents "a stark and shocking departure" from controlling case law.

See Appellants' Brief on Appeal at 13-18. In the proceedings in circuit court in the companion case on appeal, the Townships made the exact opposite arguments on each of those points:

1. The SBC does have jurisdiction to determine the validity of an Act 425 agreement;
2. The SBC must necessarily determine the validity of an Act 425 agreement in every annexation proceeding that involves such an agreement and is "uniquely suited" to do so;
3. The SBC, and not the circuit court, is the proper forum for determining the validity of an Act 425 Agreement; and
4. The *Casco Township* decision "reads almost like a treatise for the proper application of the doctrine [of primary jurisdiction]."

Appellee's Appendix, 8b-9b, 11b-16b.

The Townships' arguments proved successful in the companion case. The circuit court dismissed count 1 of TeriDee's complaint, which sought a declaration that the Townships' Act 425 Agreement was invalid, holding that the SBC had primary jurisdiction to determine the validity of the Townships' Act 425 Agreement. *Id* at 196b. After successfully persuading the circuit court to defer jurisdiction to the SBC, the Townships now claim that circuit court was the only appropriate forum for determining the validity of the Act 425 Agreement and that the SBC

should never have considered that issue. This is a textbook example of a party playing "fast and loose" with the legal system, conduct that is prohibited under the doctrine of judicial estoppel.

The doctrine of juridical estoppel "precludes a party from adopting a legal position in conflict with a position taken earlier in the same or related litigation." *Ford Motor Co v Public Service Com'n*, 221 Mich App 370, 382; 562 NW2d 224 (1997). Courts apply judicial estoppel to prevent a party "from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment." *Griffith v Walmart Stores, Inc*, 135 F3d 376, 380 (CA 6 1998) (internal citations and quotations omitted). The doctrine "is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories." *Levinson v United States*, 969 F2d 260, 264 (CA 7 1992).

As this Court most recently discussed in *Paschke v Retool Industries*, 445 Mich 502, 509-10; 519 NW2d 441 (1994), the mere assertion of an inconsistent position is not sufficient to invoke the doctrine of judicial estoppel. Instead, the doctrine applies to estop a party "who has successfully and unequivocally asserted a position in a prior proceeding" *Id.* at 510. See also *Lichon v American Universal Ins Co.*, 435 Mich 408, 416-17; 459 NW2d 288 (1990). Put another way, the doctrine was developed to prevent parties from playing "fast and loose" with the legal system. *Paschke*, 445 Mich at 509.

Because there can be no dispute that the Townships unequivocally and successfully argued that the SBC has the authority to consider the validity of the Townships' Act 425 Agreement in a prior proceeding, they should be estopped from arguing the very opposite in this case. Specifically, in their motion for summary disposition in the circuit court proceedings in the companion case, the Townships noted that the circuit court and the SBC had concurrent

jurisdiction to consider the validity of the Townships' Act 425 Agreement, but argued that the circuit court should defer to the SBC under the doctrine of primary jurisdiction.

As the Townships noted in their briefing, the doctrine of primary jurisdiction applies "whenever enforcement of [Plaintiffs'] claim requires the resolution of issues, which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Id* at 13b. (quoting *Traveler's Ins. Co. v. Detroit Edison Co.*, 465 Mich 185, 206; 631 NW2d 733 (2001)). The Townships then argued that TeriDee's claim for declaratory relief as to the validity of the Townships' Act 425 Agreement was subject to dismissal under the doctrine of primary jurisdiction "because [that claim] fits squarely within the factors that justify the doctrine's application." *Id* at 14b. Specifically, the Townships argued that the determination of the validity of an Act 425 agreement is a necessary step in any annexation proceeding and that the SBC is better suited than the Circuit Court to make such a determination:

Determination of the validity of an Act 425 Agreement is a necessary step in the SBC's annexation proceedings, as the SBC has already decided in this case. The SBC frequently hears testimony and other evidence regarding Act 425 agreements, and has already done so in this case. The SBC is not only capable of determining the validity of Act 425 agreements, but is uniquely suited to do so, since such determinations must be made in every annexation case involving an Act 425 agreement. Moreover, application of primary jurisdiction in this case is particularly appropriate, given that the SBC made prior findings of fact about the alleged deficiencies in the 2011 Act 425 agreement (Tab E), and so is uniquely situated to evaluate whether the Townships have remedied these alleged deficiencies in their 2013 Agreement. Logically, the SBC should make both sets of decisions, to maintain consistency and reasoning.

And while it is true that this Court has concurrent jurisdiction, and so could decide Plaintiffs' claims, the Court should refrain from doing so, because this would directly conflict with the principles that underlie the primary jurisdiction doctrine. If the Court were to assert jurisdiction, its decision could: (1) contravene the authority of the SBC and potentially lead to an inconsistent result; (2) undermine the SBC's jurisdiction over annexation petitions when an Act 425 agreement is involved; (3) unnecessarily spend judicial resources to decide matters not commonly before this circuit court; and (4) inefficiently split the essentially interrelated proceeding involving the annexation petition and the Act

425 Agreement between the SBC and the circuit court. This should be consciously avoided by the Court, by invocation of the doctrine.

Id at 15b-16b. (emphasis added); see also *Id.* at 233b, 272b (Townships' counsel arguing that annexation petitions and Act 425 agreements must necessarily be discussed in the same forum before the SBC and that SBC has expertise to administer Act 425).

Thus, the Townships argued that while the circuit court could exercise jurisdiction to decide the validity of the Townships' Act 425 Agreement, it should refrain from doing so under the doctrine of primary jurisdiction, because, as the Townships argued, the SBC also had jurisdiction to decide the same issue. As a result of these prior arguments, the Townships are precluded in this case from arguing that the circuit court is the only appropriate venue for the determination of the validity of an Act 425 agreement and, more fundamentally, that *Casco Township* was improperly decided.

In addition, the Townships' arguments on appeal regarding the SBC's lack of jurisdiction are also precluded under a related doctrine. Michigan courts have repeatedly held that "[a] party may not take a position in trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in trial court." *Blazer Foods Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003) (internal citation and quotations omitted). See also *In re Gerald L Pollack Trust*, 309 Mich App 125, 151; 867 NW2d 884 (2015) (same). The Townships' are most certainly seeking relief on appeal based on a position that is directly contrary to their arguments in circuit court in the companion case, which precludes their contrary arguments on appeal.

Finally, the Townships are also precluded from arguing that this Court should overturn *Casco Township* because the Townships did not raise this issue in the proceedings before the SBC or on appeal to the circuit court. Michigan generally follows the "raise or waive" rule of

appellate review. *Napier v Jacobs*, 429 Mich 222, 228; 414 NW2d 862 (1987). As such, a litigant must raise an issue in the proceedings below in order to preserve it for appellate review. *Id.* While this Court has the inherent authority to review an issue that was not raised below in order to prevent a miscarriage of justice, the general rule is that the "failure to timely raise an issue waives review of that issue on appeal." *Id.* at 227. In this case, the Townships do not explain why they failed to raise their primary argument on appeal in the proceedings below, nor do they in any way attempt to argue that review is necessary for the first time on appeal in order to prevent a miscarriage of justice. Instead, the Townships improperly attempt a sleight of hand, mentioning in passing that challenges to subject matter jurisdiction may be raised at any time, including for the first time on appeal. See Appellants' Brief on Appeal at 13.

While this is a true statement of the law, it has no application to this case. It is undisputed that the SBC has jurisdiction to determine the validity of an Act 425 agreement. The Townships are not arguing that the SBC lacked jurisdiction to make its decision below. Rather, the Townships are arguing that this Court should overturn *Casco Township*, and they also argue, at least by implication, that such a decision should be retroactively applied to invalidate the SBC's 2014 decision. This is an entirely different argument from a claim that the SBC never had jurisdiction in the first place, which is why it is not preserved for review.

Moreover, this is most certainly a case in which prospective application of any decision disturbing or overturning *Casco Township* is warranted. Prospective application of a holding is appropriate when the holding "overrules settled precedent." *Lindsey v Harper Hospital*, 455 Mich 56, 68; 564 NW2d 861 (1997). Decisions that are applied only prospectively "do not apply to cases still open on direct review" or to "the parties in the cases in which the rules are declared." *McNeel v Farm Bureau Gen Ins Co of Mich*, 289 Mich App 76, 94; 795 NW2d 205

(2010). Prospective application is warranted here because *Casco Township* is settled precedent and because the Townships did not seek to overturn *Casco Township* in the proceedings below.

IV. THE CIRCUIT COURT CORRECTLY HELD THAT THE SBC'S DECISION TO INVALIDATE THE TOWNSHIPS' ACT 425 AGREEMENT WAS SUPPORTED BY COMPETENT, MATERIAL, AND SUBSTANTIAL EVIDENCE.

In *Casco Township* the Court of Appeals held that the SBC has the jurisdiction and authority to invalidate illusory Act 425 agreements that are a mere pretext to avoid annexation. This is exactly what the SBC did in this case. The SBC specifically found that the Townships' Act 425 Agreement "was created solely as a means to bar the annexation and not as a means of promoting economic development." Appellants' Appendix, 12a. As the Court of Appeals held in *Casco Township*, such a finding will be upheld if the parties "developed a record" that could support the SBC's conclusion. *Casco Twp*, 243 Mich App at 402. There is no question that the SBC's decision in this case was supported by competent, material, and substantial evidence, and it was therefore properly upheld by the Circuit Court.

A. The Townships Mischaracterize the Holding and Analysis in *Casco Township*.

This case presents the rare circumstance when there is a single binding precedent that governs an issue on appeal. That precedent, the Court of Appeal's decision in *Casco Township*, is fatal to the Townships' argument with respect to their Act 425 Agreement and their efforts to have this Court undertake a *de novo* review on appeal. Because of this, the Townships improperly attempt to distort the holding, analysis, and facts in *Casco Township*. In particular, the Townships argue that the Court of Appeals' holding in *Casco Township* was limited to the proposition that the SBC has subject matter jurisdiction to determine whether an Act 425 agreement satisfies the statutory criteria of Act 425. In order to advance this interpretation, the

Townships have to ignore what the Court of Appeals actually wrote in its opinion, which is why they improperly suggest that most of the *Casco Township* decision is dicta.

There were two separate issues on appeal before the Court of Appeals in *Casco Township*, both of which were issues of first impression. *Casco Twp*, 243 Mich App at 395. The first issue involved the question of whether the SBC had the jurisdiction and authority to determine "whether an Act 425 agreement is valid" or whether it is "a fictional agreement intended only to deprive the commission of jurisdiction." *Id.* at 398–99. The Court of Appeals held that the SBC had the authority and jurisdiction to make that determination.

The second issue on appeal was "whether competent, material, and substantial evidence supported the commission's determination that the Act 425 agreements were merely a pretext to avoid annexation." The Court of Appeals held that the Circuit Court and SBC correctly concluded, based on the factual record before them, that there was competent, material, and substantial evidence to support the finding that the agreements were entered into to avoid future annexation "as an act of subterfuge intended to preclude the commission's jurisdiction and to avoid future annexation." *Id.* at 402.

Contrary to the Townships' assertion on appeal, the question of whether the parties "entered into" an Act 425 agreement for an improper purpose is necessarily a factual inquiry. While the result of that factual inquiry may be that the Act 425 Agreement is determined to be legally invalid, that determination will be based on the factual circumstances surrounding the enactment of the agreement, the parties' conduct, and a variety of other factors.

Thus, as the Court of Appeals noted in *Casco Township*, the SBC's determination that the Act 425 agreements at issue were invalid as "fictional agreements intended only to deprive the commission of jurisdiction" were based on the following factual findings by the SBC:

- Evidence of advertisements soliciting petition signatures in opposition to the annexation petition that contained the statement, "Help us in the preservation of farm land and open space." *Id.* at 400–01. Notably, there was no mention in *Casco Township* that this communication involved township representatives, as does the communication in this case.
- The fact that the Act 425 agreements did not provide "any real plan for economic development" and only "vaguely contemplated a plan of development at some point in the future." *Id.* at 401, 402.
- The fact that the township could not currently provide the required water or sewer services and would not be in a position to do so for at least a year and a half. *Id.* at 401.
- The township's failure to provide evidence that the property at issue was transferred, including a showing of a transfer of property tax records or voting records. Importantly, the SBC did not find that such evidence was necessary to show a valid transfer of land under Act 425, and the Court of Appeals noted that this evidence was simply one of the relevant considerations as part of the SBC's overall findings. *Id.* at 402.

Based on these factual findings, both the Circuit Court and the Court of Appeals concluded that there was competent, material, and substantial evidence to support the SBC's conclusion that the Act 425 agreements were illusory in nature and entered into in order to avoid future annexation. In that regard, it is important to note that the Court of Appeals made clear that no one fact or factor was conclusive. To the contrary, the Court of Appeals noted that "the precise reasoning behind the commission's disregard of the Act 425 agreement is not entirely clear." *Id.* That being said, the Court of Appeals affirmed the SBC's decision on the basis that the parties had developed a sufficient factual record, giving due deference to the SBC's findings. *Id.*

The holding in *Casco Township* is contrary to the Townships' argument that the SBC "rewrote" the Act 425 statute in this case by adding additional requirements that must be met in order to have a valid agreement. That is incorrect. The Court of Appeals in *Casco Township* did not set any parameters on the facts that can be considered in determining whether an Act 425 agreement was entered into to avoid annexation. As such, the SBC can properly consider, for

example, the timing of the agreement, the parties' communication and conduct, the ability of the parties to provide the required services, the benefits to the parties under the agreement, and the described proposed economic development project. All of these factors could support a finding that an Act 425 agreement is illusory. This is exactly what occurred in the proceedings below.

B. Just as in *Casco Township*, the SBC's Conclusion in This Case that the Act 425 Agreement Is Invalid Was Supported by Competent, Material, and Substantial Evidence.

The SBC properly invalidated the Townships' Act 425 Agreement as a sham agreement that "was created solely as a means to bar the annexation and not as a means of promoting economic development." Appellants' Appendix at 12a. This determination was based on five primary factors, all of which were supported by the record below.

First, the SBC found that the economic development project that is "allowed" by the Act 425 Agreement is not viable, and for good reason. As the SBC correctly noted, it is undisputed that at the time the Townships entered into the Act 425 Agreement, they had not discussed a potential development project with TeriDee, the owner of the only vacant land in the Transferred Area. *Id* at 287a. It is common sense that if the Townships were genuinely interested in an economic development project, they would have discussed that potential project with the only potential developer.

Moreover, just as in *Casco Township*, the Townships' Act 425 Agreement only vaguely contemplates some unspecified development ("the provision of mixed-use commercial/residential development") at some unspecified point in the future. This is hardly an improvement from the vague description in the Townships' first Act 425 agreement ("development of additional residential housing"). *Id* at 111a-125a. Indeed, the record makes clear that the Townships entered into their agreement notwithstanding the fact that there was no one interested in a development project that would have to meet the ten pages of development

restrictions and regulations set forth in the Townships' agreement. Indeed, the SBC saw an e-mail from George Giftos, the vice chairman of the Haring Planning Commission, to the Townships supervisors in which Mr. Giftos expressed his optimism that the restrictions in the Act 425 Agreement would drive away any potential development. Appellants' Appendix 124a. This evidence supports the SBC's finding that there was not a viable, or genuine, economic development project.

Second, the SBC correctly found that Clam Lake received no benefit from the agreement. Specifically, the Act 425 Agreement provides that Clam Lake relinquish total control of the Transferred Area and give up hundreds of thousands of dollars of taxable value and tens of thousands of tax dollars. In exchange, Clam Lake receives no tax sharing, no property tax, no personal property tax, no revenue sharing, and no specific infrastructure. Appellants' Appendix, 1440a-1463a. While the Townships claim in their brief that they agreed to amend the Act 425 Agreement to share in the utility revenue if the utilities are extended to the Transferred Area, the SBC received evidence that shows that this assertion is false. All that the Act 425 Agreement requires with respect to potential future revenue sharing that "may be necessary" is that the Townships "negotiate in good faith" with respect to an amendment to the Act 425 Agreement. *Id* at 747a.

The SBC also received evidence of the fact that the Act 425 Agreement contains almost two pages devoted to Clam Lake reimbursing and indemnifying Haring for virtually every conceivable scenario arising out of the agreement, including proceedings before the SBC and judicial proceedings involving the agreement. *Id.*, art. XII. The lack of revenue sharing when the agreement places all of the cost and risk on Clam Lake further supports the SBC's finding that the agreement is illusory and entered into solely to thwart the annexation. Indeed, the SBC

could certainly conclude that no municipality would ever approve of such a one-sided agreement unless it was entered into solely to divest the SBC of jurisdiction.

In addition, the SBC heard and received evidence that Haring had no obligation to provide water and sewer utilities to Clam Lake under the agreement, but was only required to "mutually cooperate" in "exploring" the extension of water and sewer to Clam Lake (which is no obligation at all) and only in the event that water and sewer was first extended to the Transferred Area. See, e.g., *Id* at 1446a-1450a. However, the Townships—which vehemently oppose TeriDee's proposed development of the Property—are in complete control over whether that development ever occurs. Thus, there was more than adequate evidence for the SBC to properly conclude that Clam Lake received no benefit from the Act 425 Agreement and that it was a sham designed to accomplish a different purpose than the one stated.

Third, the SBC's finding is properly supported by the e-mail correspondence between Clam Lake and Haring Township officials and area residents that TeriDee provided to the SBC. The Townships cannot dispute the fact that these e-mails specifically discuss using an Act 425 agreement as a means to deny the SBC's jurisdiction over TeriDee's proposed annexation. The best the Townships can come up with is the argument that—this time around—the Township supervisors themselves did not specifically make these statements. However, Haring Township planning commissioner George Giftos was in the thick of the new scheme, as the e-mails clearly reflect. Moreover, as the SBC noted at the adjudicative session, the Township supervisors, who were copied on the e-mails in question, made no effort to deny or disavow the fact that the Act 425 Agreement was being used for this improper purpose. *Id* at 102a-109a.

In addition, and perhaps most importantly, the fact that the communication involving Township representatives only discusses using an Act 425 agreement to block the annexation

and never for any legitimate purpose (such as utility sharing) is certainly substantial evidence of the Townships' improper motives.

Fourth, the SBC's finding was based on considerations of the Townships' ability to effectively and economically provide the required water utilities. The Townships concede that the capital cost of providing public sewer and public water to the Property will be more than twice as much as obtaining those services from the City of Cadillac, a difference of \$1,250,000, exclusive of the costs attributable to the acquisition of necessary easements and the cost of approximately \$300,000 for a water storage tank. Moreover, TeriDee's engineer projects that the cost of Township utilities will be nearly three times the cost of City utilities, a difference of almost \$2 million. These cost differences do not take into account the continuing higher O & M and commodity costs for the Township utilities as compared to City utilities. Appellants' Appendix, 1446a-1450a.

As the SBC heard in the proceedings below, development of the Property cannot be justified given the huge differential of utility costs to be paid upfront and entirely by the developer. There can be no economic development of the Property under the Townships' cost structure, which is exactly what the Townships intended. *Id.* The SBC also received evidence demonstrating that the Townships cannot effectively or timely provide the required water utilities as compared to the City and that the City has a reasonably priced public sewer available immediately across the highway and a fully functioning waste water treatment plant. *Id.*

Likewise, while the City has a well field across the highway from the Property, Haring's nearest water supply is approximately 2.5 miles away. Because of this distance, the SBC heard evidence that raised questions regarding the reliability of Township water utilities as compared to those same services from the City. Specifically, as the evidence in the record below makes

clear: (1) water utility service from the City of Cadillac would be more reliable than service from Haring; (2) the City of Cadillac can provide superior water pressure and fire flow than the minimal service that Haring "should" be capable of providing; (3) the Townships' engineers did not address the concern of higher usage rates associated with Haring water utilities; and (4) the Townships' engineers, while conceding that it will take longer for the Townships to construct the necessary utility extensions, did not properly account for the added time associated with designing and obtaining easements or permission and permits to install the water main along county or MDOT right-of-ways. *Id*; see also 1829a.

Fifth, the SBC correctly determined that the timing of the Act 425 Agreement supported the conclusion that it was a sham. In *Casco Township* the townships entered into their Act 425 agreements several months before the property owners filed their annexation petitions. *Casco Twp*, 243 Mich App at 396. Here, the timing is even more compelling, as the Townships did not begin the process of enacting their agreement until they learned of TeriDee's intention to file a new annexation petition. The Townships then rushed to enter into their agreement between April 15, 2013, and May 8, 2013, when they called a joint special meeting to approve the contract. Moreover, as the SBC specifically noted during the adjudicative session, while the Townships represented during the 2011 SBC proceedings that they were ready to immediately proceed with development under their prior Act 425 agreement, they undertook no work on a new agreement until they learned of TeriDee's plans to re-file for annexation. *Id* at 316a.

Finally, unlike in *Casco Township*, the SBC in this case had before it the compelling fact that the Townships recently had their previous Act 425 agreement invalidated as a sham. This history is highly relevant and supports the SBC's findings regarding the Townships' motivations in entering into their second Act 425 Agreement. The fact that the Townships withheld the e-

mails referenced above from the Commission—while essentially boasting that there were no incriminating e-mails this time around—likely did little to bolster their credibility. *Id* at 1821a-1824a.

Thus, just as in *Casco Township*, the SBC's decision to invalidate the Townships' Act 425 Agreement was based on substantial evidence. Any one of the foregoing factors would have been sufficient to support the SBC's decision. Combined, they made the SBC's decision unassailable on appeal.

V. THE CIRCUIT COURT CORRECTLY HELD THAT THE DOCTRINE OF COLLATERAL ESTOPPEL HAS NO APPLICATION IN THIS CASE.

The Townships did not raise the doctrine of collateral estoppel before the SBC, and they do not provide any authority to support their argument on appeal. That is, the Townships did not provide any Michigan case law on appeal in which (1) the doctrine of collateral estoppel has been applied from one administrative proceeding to another; (2) the doctrine of collateral estoppel has been applied to an SBC decision; or (3) the doctrine of collateral estoppel has been applied to a Michigan administrative proceeding where there is a statutory right of reapplication. All of that is not to say that there is anything novel about the Townships' argument, which is easily defeated by the routine application of the law of collateral estoppel to the facts of this case.

Faced with the lack of any supporting Michigan authority, the Townships would have this Court rely on federal decisions involving the Social Security Act and the Federal Black Lung Benefits Act. However, this supplemental authority is completely inapposite because none of the federal decisions apply nor discuss the additional, specific requirements that Michigan courts impose with respect to collateral estoppel at the administrative proceedings level. As such, the federal case law presented in the Townships' briefing is completely irrelevant.

In order for collateral estoppel to apply to an administrative proceeding under Michigan law, the proceeding must have been adjudicatory in nature, allowed for an appeal, and the legislature must have intended that the decision be final. See, e.g., *Holton v Ward*, 303 Mich App 718, 731–32; 847 NW2d 1 (2014). Moreover, the ultimate issue to be determined in the second action must be identical to that involved in the first action. *Eaton Cnty Rd Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). None of the federal court decisions in the Townships' briefing discuss these specific requirements for applying collateral estoppel to an administrative proceeding under Michigan law, which is why they add nothing to the analysis.

As is discussed in detail below, the reason that the Townships run from Michigan law and focus their argument on a lengthy discussion of various federal cases is because they cannot satisfy any of the requirements under Michigan law for applying collateral estoppel to an administrative proceeding. The Circuit Court was not persuaded by this tactic and correctly applied Michigan law in holding that collateral estoppel does not apply in this case. Appellants' Appendix, 143a.

A. The Townships Waived the Issue of Collateral Estoppel by Failing to Raise It Below.

Despite the Townships' claims to the contrary, they did not raise the argument of collateral estoppel below, either in name or in substance. For example, while they raised several legal arguments in opposition to the Townships' annexation petition in their filed objections, they did not argue that the SBC was bound by its previous decision. Likewise, while the Townships claim in their reply on appeal that they did raise some semblance of the argument in their subsequently-filed 30-day submission, citing to pages 29 through 30 and 41, that is not true. Nowhere in their 30-day submission, including at the cited pages, do the Townships claim that the SBC is bound as a matter of law by its previous findings and determinations.

Notwithstanding their failure to do so, there is nothing that prevented the Townships from raising this argument before the SBC. Indeed, the potential application of collateral estoppel was one of the issues that the SBC specifically considered—and rejected—in the *Casco Township* case. For these reasons, the Circuit Court was correct in holding that the issue of collateral estoppel "was inadequately raised with the SBC by the townships." *Id* at 143a.

Thus, the Court should not consider the Townships' collateral estoppel argument, as the Townships waived this issue by failing to raise it below. As set forth above, it is well settled under Michigan law that "issues raised for the first time on appeal are not ordinarily subject to review." *Booth Newspapers Inc v Univ Mich Bd Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Indeed, the Michigan Supreme Court has stated that it has "only deviated from [this] rule in the face of exceptional circumstances." *Id.* at 234 n23. Courts "need not address issues first raised on appeal," but they "*may* disregard the issue preservation requirements and review may be granted if failure to consider the issue would result in *manifest injustice*." *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95–96; 693 NW2d 170 (2005)(emphasis added).

While the Townships could have asked for leave to raise the issue of collateral estoppel for the first time on appeal, they did not do so. And even if the Townships had sought leave, they could not make the required showing that there are "exceptional circumstances" that support the preservation of this issue.⁵ Nor can the Townships point to any manifest injustice that will

⁵ In fact, the Townships' failure to raise this issue below thwarted the entire rationale behind the doctrine itself. As the Michigan Supreme Court very recently noted, "The doctrine of collateral estoppel serves many purposes: it 'relieve[s] the parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication.'" *People v Wilson*, 496 Mich 91, 99; 852 NW2d 134 (2014). Here, none of those purposes could be served because the subsequent proceedings have already taken place. In short, there would be no point in retroactively applying the doctrine now, and there are certainly no "exceptional circumstances" that would warrant allowing the Townships to raise this issue for the first time on appeal. Moreover, an administrative agency

result should this Court decline to address the issue of collateral estoppel. Indeed, to allow the Townships to raise the issue now "would contravene the longstanding rule against a party 'harboring error as an appellate parachute.'" *Id.* at 96 (quoting *Marshall Lasser PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002)). Furthermore, the underlying rationale for issue preservation favors applying the rule here and declining to review the Townships' unpreserved argument. As the Michigan Supreme Court explained:

The principal rationale for the [issue preservation] rule is based in the nature of the adversarial process and judicial efficiency. By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually.

* * *

Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute.

Walters v Nadell, 481 Mich 377, 388; 751 NW2d 431 (2008). Allowing the Townships now to raise the issue of collateral estoppel would undermine the very reasons for the issue preservation rule. Accordingly, this Court should decline to address it.

B. The Legislature Did Not Intend for SBC Decisions Denying Annexation Petitions to Be Final.

It is plainly evident from the unambiguous language of the operative statute that the legislature did not intend SBC decisions to be final because that statute expressly authorizes parties—without limitation or qualification—to submit new annexation petitions two years after a prior petition was decided by the SBC. See MCL 123.1012(3). In other words, it would be perfectly permissible for a party to file an annexation petition on January 1, 2014, and, if that petition was voted down, to file it again on January 2, 2016. That is the exact opposite of a

itself can waive the application of the doctrine by reopening proceedings. See, e.g., *Hillier v Social Sec Admin*, 486 F3d 359, 364–65 (CA 8, 2007).

situation in which the legislature intends for a decision to be final, which is why it is nonsensical to even consider the doctrine of collateral estoppel in this setting.

The Court of Appeals has had no trouble reaching this very conclusion, referring to MCL 123.1012(3) as the "two year restriction on duplicate petitions." *Twp St Joseph v Mich State Boundary Comm'n*, 101 Mich App 407, 413; 300 NW2d 578 (1981)(emphasis added). Likewise, in *Township of Avon v Michigan State Boundary Commission*, 96 Mich App 736, 739, 752; 293 NW2d 691 (1980), the Court of Appeals similarly rejected the appellants' claim that MCL 123.1012(3) barred a subsequent petition involving the same area.

In an attempt to keep their argument alive, the Townships make the completely unsupported assertion that a new petition can only be filed after the two-year period if there is a change in the underlying facts. The problem with this assertion is that it is not found in, nor in any way supported by, the plain and unambiguous language of the statutory provision at issue—or any other authority. That being the case, the Court must reject the Townships' argument because "clear statutory language must be enforced as written" and a reviewing court "cannot read into a statute language that was not placed there by the Legislature." *Johnson v QFD Inc*, 292 Mich App 359, 369–70; 807 NW2d 719 (2011). To require some change in the underlying facts before a new petition can be filed, as the Townships now assert is the case under MCL 123.1012(3), would clearly run afoul of this well-settled law. It would also run afoul of the Court of Appeals' previous holding on this issue in *Township of Avon*, where the Court, in rejecting an argument that the statute prohibited a later petition, specifically held that "[t]here is no ambiguity in the statute." *Twp Avon*, 96 Mich App at 752.

Thus, the only prohibition on filing a subsequent petition, even one that covers "all" of the property that was subject to a prior petition, is that the "duplicate" petition not be filed within

two years after the prior petition was denied. By including the two-year language, the legislature made clear that the denial of an annexation petition was not intended to be final after two years. If the legislature intended for the first decision to be final, this statutory provision would not exist. The Townships' position either renders the statute meaningless or attempts to add additional requirements. Because the denial of an annexation petition is not intended to be final after two years, the doctrine of collateral estoppel does not apply.

C. The SBC's Decision-Making Process with Respect to Annexation Is Not Adjudicatory in Nature.

Collateral estoppel also does not apply in this case because the SBC's decision to approve an annexation petition is not adjudicatory in nature. While the doctrine of collateral estoppel does apply to "unappealed administrative determinations that are adjudicatory in nature," it does not apply where the administrative determination involves a legislative function. *Champion's Auto Ferry Inc v Pub Serv Comm'n*, 231 Mich App 699, 712; 588 NW2d 153 (1988). Indeed, Michigan courts have repeatedly refused to apply the doctrine of collateral estoppel to decisions by the Michigan Public Service Commission fixing and regulating rates. See, e.g., *Consumers Energy Co v Mich Pub Serv Comm'n*, 268 Mich App 171, 177; 707 NW2d 633 (2005)(holding that because regulating and fixing rates is a legislative function, any prior determination by the PSC "cannot be binding under the doctrines of res judicata and collateral estoppel").⁶

Just as rate-making has repeatedly been held to be a legislative function, the same is true with respect to annexation:

⁶ See also *Van Wulfen v Montmorency Cnty*, 345 F Supp 2d 730 (ED Mich 2004). In *Van Wulfen* the court held that proceedings to establish the normal level of an inland lake under MCL 324.30707, which required the consideration of numerous statutory factors, was legislative in nature. *Id.* at 739–40. The court reached this holding notwithstanding the fact that the process required a hearing to evaluate the competing interests of various constituencies as well as testimony and evidence. *Id.* at 740. Because the proceedings were legislative in nature, the doctrine of collateral estoppel could not apply. *Id.*

The changing of the boundaries of political divisions is a legislative question, and the power to annex territory to municipalities has often been delegated to boards of supervisors or other public bodies.

Shelby Charter Twp, 425 Mich at 56 n3 (emphasis added); see also *Meridian Charter Twp v Ingham Cnty Clerk*, 285 Mich App 581, 594; 777 NW2d 452 (2009)(holding that "the fixing of municipal boundaries is a legislative function and the Legislature is permitted to change such boundaries at will"); *Charter Twp Bloomfield v Oakland Cnty Clerk*, 253 Mich App 1, 31; 654 NW2d 610 (2002)(same; collecting authorities).

Thus, while the legislature has delegated the authority to decide annexation petitions to the SBC, it is no less of a legislative or "political" function:

In this context it is again relevant that **the power here delegated** does not involve any vested right or legally protected interest.

* * *

The annexation question is essentially political, and political considerations cannot be avoided whether the power is exercised by the Legislature itself or by an authority to which the power is delegated. The ultimate decision will be a value judgment based on the particular facts and circumstances of the annexation under consideration. It would unduly inhibit both the exercise of the Legislature's prerogative to **delegate the power to decide on annexation** and the function of the Commission to require greater particularity in the explication of criteria or standards.

Midland Twp, 401 Mich at 669 (emphasis added). Having come directly from the legislature itself, there can be no question that the power to decide annexation petitions is a legislative function. As such, the doctrine of collateral estoppel does not apply as a matter of law, regardless of the nature of the proceedings below.

D. There Has Been a Change in Circumstances in This Case, and the Ultimate Issue Considered Was Not Identical to the Prior Proceeding.

The ultimate issue to be decided in an annexation proceeding—whether a particular parcel of property should be annexed—will never be identical from one proceeding to the next, even, unlike in this case, when the exact same panel is involved in both proceedings. That is

because the ultimate decision is a "political question" that will be a "value judgment based on the particular facts and circumstances of the annexation under consideration." *Midland Twp*, 401 Mich at 669 (emphasis added). For this reason, one member of the SBC may give greater weight to one or more criteria and much less weight to the others. Another member might find different criteria to be more persuasive in making that member's decision. And any member may find a single particular criterion "to be of decisive importance outweighing all other criteria." *Id.* at 676.

It is therefore nonsensical to argue that the doctrine of collateral estoppel should be applied to a determination that is a "political question" and a "value judgment." At best, the Townships could make the novel argument that the doctrine of collateral estoppel should apply to each individual member's vote on annexation, but even that test would be satisfied in this case. The three members of the SBC panel who presided over TeriDee's previous annexation cast identical votes, while the two new members of the panel, including the Townships' designated representative, voted in favor of annexation.

Moreover, it is undisputed that the "facts and circumstances of the annexation under consideration" were not "identical" in both proceedings. *Id.*; *Eaton*, 205 Mich App at 376. As an example, the SBC received undisputed evidence in the proceedings below that the capital cost of providing public sewer and public water to the Property will be more than twice as much as obtaining those services from the City, a difference of at least \$1,250,000. Appellants' Appendix, 1447a-1448a. The SBC indicated that the factual findings regarding this cost differential, which applies directly to the statutory criteria related to "the present cost and adequacy of governmental services in the area," support annexation of the Property. *Id.* at 15a. In contrast, there were no factual findings by the SBC regarding the cost to provide the required

utilities in the prior proceedings. Rather, the SBC simply noted that "Haring indicates that [it] can provide Clam Lake Township with the needed public services." Appellee's Appendix, 163b.

As the Michigan Supreme Court made clear in *Midland Township*, the ultimate issue before the SBC—the approval of an annexation petition—can be properly based on a single, decisive criterion. *Midland Twp*, 401 Mich at 676. Here, the SBC heard undisputed evidence in the proceedings below that (1) the proposed development requires water and sewer utilities; (2) it will cost at least an additional \$1.25 million if those utilities are provided by the Townships as opposed to the City of Cadillac; (3) those costs would be imposed on the developer; and (4) the development was not viable with those additional costs. This new evidence, which was not before the SBC in the prior proceeding, supports at least one of the enumerated statutory criteria. It is therefore enough, by itself, to justify the SBC's determination, and it may have well caused certain of the commissioners to make the political, value judgment in favor of annexation. Because there was new evidence to inform the commissioners' value judgments regarding the annexation of the property, the ultimate issues in the two proceedings were not identical. For this additional reason, the doctrine of collateral does not apply in this case.

RELIEF REQUESTED

Based on the foregoing, TeriDee respectfully requests that this Court affirm the State Boundary Commission's Summary of Proceedings, Findings of Fact, and Conclusions of Law as approved by the Final Decision and Order of the director of LARA, and award TeriDee any other relief to which it is entitled.

Respectfully submitted,

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